

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 11 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SAMANTHA C.,)	2 CA-JV 2010-0018
)	DEPARTMENT A
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY and JOSEPH C.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J19015800

Honorable Javier Chon-Lopez, Judge

AFFIRMED

Child Advocacy Clinic

By Paul D. Bennett, a clinical professor
appearing under Rule 38(d), Ariz. R. Sup. Ct.

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Dawn R. Williams

Tucson
Attorneys for Appellee
Arizona Department of Economic Security

HOWARD, Chief Judge.

¶1 Samantha C. appeals from the juvenile court's order terminating her parental rights to her son, Joseph, after she failed to appear at the initial hearing on the motion to terminate her parental rights filed by the Arizona Department of Economic Security (ADES). We will not disturb a juvenile court's order terminating a parent's rights unless the order is clearly erroneous. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). We view the evidence in the light most favorable to upholding the factual findings upon which the order is based. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). We affirm the termination order in this case.

¶2 ADES filed a dependency petition in March 2009, alleging Joseph had tested positive for methadone and cocaine at his birth in late February and was still exhibiting signs of withdrawal from the drugs. ADES alleged Samantha had a long history of substance abuse, had tested positive for cocaine during her pregnancy, and had tested positive in March for methadone and "high amounts of cocaine," although her sample had been "diluted." ADES also alleged that after Samantha had been offered assistance from Child Welfare Services (CWS) in California, where Joseph was born, and had agreed to participate in intensive in-home services there, she had moved to Arizona without informing CWS in an attempt to avoid the agency. Finally, ADES alleged that Samantha had a criminal history "characterized by drug-related offenses" and a domestic violence history with a previous boyfriend, that she had reported suffering from depression, and that she had a mental illness of an unknown diagnosis for which she had been prescribed medication.

¶3 Samantha denied the allegations in the petition and “submitted” the issue of dependency to the court, which adjudicated Joseph dependent in May 2009. The initial case-plan goal was family reunification, but the court approved a concurrent goal of severance and adoption in August 2009, after finding Samantha was not in compliance with the case plan. At the same hearing, the court appointed a guardian ad litem (GAL) for Samantha.

¶4 At a permanency-planning hearing in October 2009, ADES reported that Samantha had not been submitting to drug testing and had recently missed visits with Joseph. ADES moved to change the case-plan goal to severance and adoption because of Samantha’s failure to comply with the case plan. Following a brief recess and “side bar conference,” during which counsel and the court “discuss[ed], in private, legal issues pertaining to th[e] case,” Samantha’s counsel informed the court that Samantha was “in crisis” and moved to continue the hearing. The court denied the motion, stating in its minute entry that the GAL believed Samantha could proceed, but it also noted the GAL did “not believe [Samantha] ha[d] an understanding of the proceedings.”

¶5 The court granted ADES’s motion to change the case-plan goal to severance and adoption and directed ADES to file a motion to terminate Samantha’s parental rights. It admonished Samantha that she was required to appear at the initial termination hearing and that her failure to do so could result in termination of her parental rights. The court also admonished her that if she failed to appear, she would be deemed to have waived her right to a trial and to have admitted the allegations in the motion to terminate her parental rights. In its subsequent motion to terminate Samantha’s

parental rights, ADES alleged her mental illness or chronic substance abuse and the length of time Joseph had been in out-of-home care as the statutory grounds for termination.

¶6 Samantha did not appear at the initial termination hearing on December 1. ADES moved to proceed in her absence, and neither Samantha’s attorney nor her GAL objected. Counsel stated she did not know why Samantha was not present but confirmed Samantha “was aware of the date.” The case manager testified she had received a “voice mail” from Samantha on Thanksgiving Day, stating she would be at the hearing. The court found Samantha had been properly advised of the hearing, had been “admonished, orally, of the consequences of failing to appear,”¹ and had “voluntarily” failed to do so. The case manager testified, and the court admitted the manager’s permanency-planning report and addendum into evidence, also without objection. The case manager’s testimony and report chronicled essentially the same facts that ADES had alleged in the dependency petition and motion for termination, including Samantha’s lack of compliance with the requirements of her case plan and her ongoing failure to submit to drug testing and remain substance free. The case manager opined termination of Samantha’s parental rights was in Joseph’s best interests, testifying that Joseph was adoptable and was doing well in his prospective adoptive placement. The court found clear and convincing evidence established both statutory grounds alleged in ADES’s motion. The court further found a preponderance of the evidence established termination of Samantha’s parental rights was in Joseph’s best interests.

¹Apparently, she had refused to sign a written copy of the admonishment.

¶7 On appeal, Samantha does not challenge the sufficiency of the evidence to support the termination order. Rather, she challenges only the propriety of the court’s proceeding with the severance hearing in her absence. In that regard, she asserts the juvenile court erred by finding she had voluntarily failed to appear, given what she describes as “ample evidence” Samantha had not understood the court’s admonishment at the permanency-planning hearing.

¶8 Rule 65(C)(6)(c), Ariz. R. P. Juv. Ct., which our supreme court promulgated to give effect to A.R.S. § 8-863(C), provides as follows:

If the parent . . . fails to appear at the initial termination hearing without good cause shown and the court finds the parent . . . had notice of the hearing, was properly served pursuant to Rule 64 and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent . . . and that failure to appear may constitute a waiver of rights and an admission to the allegations contained in the termination motion or petition, the court may proceed with the adjudication of termination based upon the record and evidence presented if the moving party or petitioner has proven grounds upon which to terminate parental rights.

We understand the court’s voluntariness finding to be a determination that Samantha had failed to show good cause for her absence. *See Marco C. v. Sean C.*, 218 Ariz. 216, n.3, 181 P.3d 1137, 1141 n.3 (App. 2008) (“We may generally infer findings of fact necessary to sustain a court’s order.”). We review the juvenile court’s decision to proceed in the absence of a parent for an abuse of discretion. *Lindsey M. v. Ariz. Dep’t of Econ. Sec.* 212 Ariz. 43, ¶ 13, 127 P.3d 59, 62 (App. 2006). For several reasons, we find none here.

¶9 First, neither Samantha’s counsel, nor her GAL objected to the court proceeding in Samantha’s absence or asserted she had not understood the admonition; nor did Samantha file a motion and affidavit pursuant to Rule 46(E), Ariz. R. P. Juv. Ct., raising such contentions. Generally, issues not raised in the juvenile court may not be asserted on appeal. *See Christy C. v. Ariz. Dep’t of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007).

¶10 But even assuming Samantha’s contentions were not waived, her arguments are unavailing. They rest principally on events at the permanency-planning hearing, and, as ADES points out, we have not been provided a transcript. It was Samantha’s burden to ensure portions of the record necessary to her argument, but not part of the presumptive record, were provided to us. Ariz. R. P. Juv. Ct. 104(D), (E). We presume that missing portions of the record support the juvenile court’s rulings. *See Adrian E. v. Ariz. Dep’t of Econ. Sec.*, 215 Ariz. 96, ¶ 21, 158 P.3d 225, 231 (App. 2007) (“We generally presume items that are necessary for our consideration of the issues but not included in the record support the court’s findings and conclusions.”). Furthermore, the court noted in its minute entry that Samantha’s GAL, the individual charged specifically with investigating and reporting on Samantha’s competency, *see* Ariz. R. P. Juv. Ct. 40(C), informed the court she believed Samantha could “proceed” with the permanency-planning hearing. Based on the record before us, we disagree with Samantha that, given the GAL’s belief that she did not have “an understanding of the proceedings,” the juvenile court was required to find Samantha had not understood the court when it told her she had to appear at all hearings and the consequences for failing to do so. Nor did it

prohibit the court's determination that Samantha had failed to appear voluntarily and without good cause.

¶11 Samantha further contends that, based on the GAL's concerns about her lack of understanding and other indicia of incompetency, the juvenile court was required to set an additional hearing to investigate the reason for Samantha's absence before proceeding with the severance hearing. Samantha has cited no authority to support this contention. Additionally, her reliance on Rule 40 is misplaced. That rule requires only those hearings "determined to be necessary to protect the interests of the parent." Ariz. R. P. Juv. Ct. 40(C). By proceeding with the adjudication, the court implicitly concluded no additional hearing was necessary. The juvenile court did not abuse its discretion in so finding and proceeding directly to the adjudication.

¶12 For the reasons stated herein, we affirm the order terminating Samantha's parental rights.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge